Reg. No. GR/RNP/GOA/32

RNI No. GOAENG/2002/6410

Panaji, 18th August, 2005 (Sravana 27, 1927)

SERIES II No. 20

OFFICIAL GAZETTE

GOVERNMENT OF GOA

SUPPLEMENT

GOVERNMENT OF GOA

Department of Labour

Notification

No. 28/6/2005-LAB

The following Award passed by the Industrial Tribunal of Goa, at Panaji-Goa on 28-01-2005 in reference No. IT/18/2003 is hereby published as required by Section 17 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947).

By order and in the name of the Governor of Goa.

Vasanti H. Parvatkar, Under Secretary (Labour).

Porvorim, 7th February, 2005.

IN THE INDUSTRIAL TRIBUNAL
GOVERNMENT OF GOA
AT PANAJI

(Before Shri Ajit J. Agni, Hon'ble Presiding Officer)

Ref. No. IT/18/2003

Workmen,
Rep. By the Goa MRF Employees Union,
Saidham,
Ponda-Goa. ... Workman/Party I

V/s

1. M/s. Icarus Food & Farm,
   Villa Sameera, St. Cruz,
   Ponda-Goa. ... Employer/Party II (1)

2. M/s. MRF Ltd.,
   Curti, Ponda-Goa ... Employer/Party II (2)

Workmen/Party I - represented by Adv. Shri V. Menezes.

Employer/Party II(1) - Represented by Adv. Shri Rohit Bras.

Employer/Party II(2) - Represented by Adv. Shri G. K. Sardessai.

Panaji, dated: 28-1-2005.

AWARD

In exercise of the powers conferred by clause (d) of sub-section (1) of Section 10 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947) the Government of Goa by order dated 31-3-2003 bearing No. 28/44/2002--LAB/1058 referred the following dispute for adjudication of this Tribunal.

(1) "Whether the demand of the Goa MRF Employees Union, on the ground that the contract between M/s. Madras Rubber Factory Ltd., and M/s. Icarus Food and Farms is a sham and bogus, for absorption of three canteen workers namely S/Shri Ragoba X. Fallari, Santosh Sangodkar and Subhas Naik, by the management of M/s. Madras Rubber Factory Ltd., with effect from 1-10-1996, with appropriate fitment in the pay scales is legal and justified ?

(2) If not, what relief the said three workmen are entitled to ?"

2. On receipt of the reference a case was registered under No. IT/18/2003 and registered A/D notice was issued to the parties. In pursuance to the said notice the parties put in their appearance. The Workmen/ /Party I (for short, "Union") filed its statement of claim at Exb. 3. The facts of the case in brief as pleaded by the union are that it represents the overwhelming majority of the workmen engaged at the factory of the Employer/ /Party II (2)(for short, "Company") at Usgao-Goa. That the company is engaged in the business of manufacturing of tyres and employs more than 1000 workmen besides about 100 management staff and for that purpose the company requires to run a statutory

canteen under Sec. 46 of the Factories Act. That the Employer/Party II(1) (for short, "Contractor") is a canteen contractor who has entered into sham contract with the company only with a view to deprive the workmen of all the benefits that would be conferred upon them of regular employees of the company. That the workmen Shri Raghuba Falari, Shri Santosh Sangodkar and Shri Subhash Naik whose names are mentioned in the order of reference (for short, "workmen") were persistently continued to be engaged by the company through the contractor and they have been continuously in service without any break from the date of their employment with the company through the contractors and that the employment of the workmen continued irrespective of the fact that in the past the canteen contractor changed. That due to adverse labour policy of the company the canteen workers were treated as contract workers by persistently setting up a middleman in the guise of a contractor with a view to deprive the workers the benefits conferred on regular employees and as such the union was forced to file a writ Petition 374/96 before the Hon'ble High Court of Bombay at Panaji claiming therein all service conditions and treatment of the canteen workers as permanent workers of the company. That in the said Writ Petition it was contended by the union that treating the canteen workers as contract workers without granting them status of permanency and continuity of service and parity with regular confirmed employees amounts to unfair labour practice. That it was also contended that the contract signed between the company and the contractor is a sham and bogus contract entered with a view to deny the workers the benefits of permanency and regular employment with the company. That the workman Shri Ragoba Fallari joined service through contractor from 1-8-75, Shri Santosh Sangodkar from 1-4-89 and Shri Subhash Naik joined services from 1-6-1990 and they worked continuously without interruption or being transferred, in the company's canteen irrespective of the change in the canteen contractor. That even when demands were raised in the past for regularisation of services of the workers with the company, the negotiations were held in the presence of company's representative before the Asst. Labour Commissioner. That the company entered into sham contract with the contractor on 30-9-94 which expired on 30-9-95 and it was renewed for a fresh period from 1-10-95 to 30-9-97. That among other terms, the contract provided for free premises equipment, furniture, Freezers, utensils, crockery, cutlery by the company and also the cost of electricity and water was borne by the company and the imposition of penalties was provided in case of failure to perform duties under the contract. That the said contract also stipulated that the company would procure all items required for the preparation of food through the Goa MRF Employees Credit Co-operative Society and that the menu of various items would be provided by the company and infact the menu was monitored through committee controlled and appointed by company. That the company used to make payments directly to the said Consumer Society for the supply of grains, vegetables food staff oil etc., made by the Society directly to the Contractor. That the company had charge sheeted 6 of its permanent workers for committing fraud while supplying materials from the Society to the canteen when they were the members of the purchase committee of the society and in the enquiry it was the stand of the company that it had complete control over the canteen and society. That deductions were being made from the salary of the workmen towards thrift fund contribution/scheme run by the company under a settlement signed between the union and the company for its workers and thrift loans were being sanctioned by the company to the workmen and to the other canteen workmen and recovery was being made from their wages towards the said thrift scheme of the company. That the contribution made by the contractor towards ESI was refunded by the company to the contractor. That right from the inception of the canteen was run within the factory premises as a statutory canteen and the various settlements signed between the company and the union contain clauses under which the company subsidised all meals and eatable served in the canteen which is a part of the service condition of the permanent workmen. That the permanent workmen are paid 3 times the wages of the canteen workmen and thus the canteen workmen are denied the benefits of permanency, that is, the benefits of higher wages for similar work. That the work done by the workmen such as serving food at the canteen, cleaning utensils, cleaning vegetables, cutting, storing, cooking are similar to the work done by the workmen in various departments of the company, that the comapany has absorbed 6 canteen employees namely Rohidas Naik, Gauridhar Naik, Datta Kotarkar, Premanand Govekar, Dnyaneshwar Rane and Ghanashyam Gadkar from February, 2003 who were doing the same work as done by the workmen in the present dispute and they have been given permanent status and all benefits conferred on permanent workmen. That the services of the workmen has been terminated/retrenched illegally and as a means of victimisation for having demanded absorption as regular employees. That the canteen functions under the direct supervision and administration of the company and the day to day running of the said canteen is controlled and looked after by the officer of the company assigned for the said work and the company also decides the details of the functioning menu, supply of furniture, utensils, cooking materials and supervision of works and materials. The union contended that the contract for running the canteen entered into between the company and the contractor is a sham and bogus contract; the workmen employed in the canteen through the contractor are entitled to be absorbed as regular workmen of the company from 1-10-96 with all consequential benefits that regular workmen in that grade would have got. The workmen are entitled to regularisation due to long and continuous service and/or perennial nature of work; employing canteen workmen as contract workmen constitutes unfair labour practice under Item 10 of the 5th Schedule of the ida; the Contract workmen after regularisation are entitled to fitment as detailed in Annexure A. The union prayed that it be declared that the contract

between the company and the contractor as sham and bogus and the company be directed to absorb the w. kmen in the present dispute as permanent workmen of the company with full benefits with effect from 1-10-96 and appropriate fitment in the grade/pay scales.

3. The company filed written statement at Exb. 7. By way of preliminary objection the company stated that the union has no locus standi to raise the present dispute; that the dispute raised is an individual dispute and not collective dispute; that the reference proceeds on the assumption that the workmen in the dispute are the workmen of the company when the dispute as regards the validity of their termination of service by the contractor is pending before this Tribunal in ref. IT/61/2002; that the terms of the reference goes beyond the scope of the pleadings, relief prayed for and the order of the Hon'ble High Court in writ petition No. 374/96, and that the reference is a consequence of non-application of mind on the part of the Government. The company stated that Shri Rohidas Naik ceased to function as the member of the Goa MRF Employees Union and thus he has no right or authority to sign the claim statement. The company stated that as the over whelming majority of the members of the Union joint Mumbai Mazdoor Sabha, the union has no status under Trade Unions Act, 1926 and it is not competent to raise the dispute. The company denied that the Union namely Goa MRF Employees Union represents overwhelming majority of the workmen employed by them and stated that majority of the employees are the members of Goa MRF Union. The company denied that it employs more than 1000 workmen or that it has been persistently continuing to engage employees through contractor or that it has entered into sham contract with a view to deprive the workmen all the benefits of its regular employees. The company denied that it controlled the canteen committee or that it committed unfair Labour practice under item 10 of the Vth Schedule to the Industrial Dispute Act, 1947 or that the contract between the company and the contractor is a sham and bogus contract. The company admitted that it had charge sheet six of their permanent workmen for misconduct but denied that it was its stand that it had complete control over the canteen and the Icarus Foods and Farms Employees consumer Co-operative society. The company stated that the thrift fund contribution/ /scheme is applicable only to the permanent employees of the company and it is the product of the settlement dated 20-11-91 signed between the company and its permanent workmen, and the said scheme was not applicable to the workmen engaged by the contractor. The company stated that the workmen in the present dispute are not its workmen and further stated that though the canteen is run for the benefit of its permanent workmen, there is no obligation in fact and in law that the canteen has to be run by its permanent workman. The company stated that the nature of the operations of a canteen involves specialization and therefore the operation of the canteen by the organized group of workmen who have the necessary experience and specialization to run the canteen on economical lines and reap the benefits of the same through co-operative society cannot but be complimented and those who have not opted to be a part of this co-operative efforts cannot now turn around and claim to be the employees of the company. The company denied that the work done by the canteen workmen is similar to the work done by the permanent workmen of the company. The company denied that the canteen functions under its direct supervision and administration, or that the canteen is controlled and looked after by its office, or that it decides the details of the functioning, menu, supply of furniture and utensils, cooking materials and supervision of works and materials, or that it has adopted any unfair Labour practice. The company denied that the workmen in the present dispute are entitled to absorption or regularization by the company.

4. The company stated that the employees engaged in its factory, are in the category of engineering workmen, drivers, watchmen, sweepers and sanitation attendants which are placed in various grades. The company stated that it has its own recruitment policy under which a person is initially appointed as a trainee or apprentice under it scheme, and satisfactorily completing the training or apprenticeship period he may be placed on probation and on completing the probationary period satisfactorily he is confirmed in service and is placed on permanent roll of the company. The company stated that it maintains canteen under Sec. 46 of the factories Act, 1948 and as provided under the said Act the rules made there under, the company provided the contractor with basic infrastructure. The company stated that the canteen operation is a specialized and business and since the proprietor Shri T. J. John of M/s. Icarus Foods and Farms, the contractor, is a diploma holder in Hotel management and catering Technology and had conducted canteen operations in different factories in different parts of India, he was offered the contract of operating. The company stated that the contractor obtained the license for running its said canteen under the provisions of contract Labour (Regulation and Abolition) Act and it is also registered under the said Act for employment of contract Labour. The company stated that the contractor had its own recruitment policy for recruiting workmen in the canteen and maintained master roll, wage register etc., paid their salaries and it was allotted separate code number under ESI and EPF Act and paid contribution in respect of the employees employed by it. The Company stated the supervisors of the contractor had the direct supervision and control over canteen workmen and there was no previty of contract whatsoever between the company and the employees of the contractor. The company stated that the canteen workmen formed their union and raised various demands and signed settlements with the contractor. The company stated that a settlement dated 14-2- 97 was signed between the contractor, Icarus Foods and Farmers Union and the company under sec. 12 (3) of the Industrial Dispute Act, 1947 under which it was agreed that the union will withdraw the demand for absorption of contract employees and organize themselves into a co-operative society exclusively

operated by them and it was agreed that the company would grant the contract to the society as soon as the society intimates to the company their readiness to accept the contract of running the canteen, and subsequently the contract of running the canteen was awarded to the said society and the contract was renewed from time to time. The company stated that as the canteen is operated by the society and the workmen in the present dispute chose not to opt for membership of the said society the Industrial dispute does not survive. The company stated that the services of the workmen in the present dispute have been terminated by the contractor and the dispute raised by the said workmen is pending before this Tribunal and as such the workmen now cannot claim to be the workmen of the company.

5. The contractor filed written statement at Exb. 6. By way of preliminary objection the contractor stated that there is no employer employee relationship between the workmen and the contractor, and that the union has no locus standi to raise the present dispute. The contractor stated that it was offered the contract of running the canteen by the company to cater for the workmen employed by it in its factory situated at Usagaon, Ponda-Goa. The contractor stated that it has its own recruitment policy and it engaged workmen in the category of cooks, waiters, cleaners etc. and the company had no say as to who should be employed nor it could interfere in the recruitment policy followed by the contractor. The contractor stated that it maintained the muster roll, wage register, paid salary to the workmen employed in the canteen. The contractor stated that it had the separate code number allotted under ESI Act and it paid contributions of the employees employed in the canteen. The contractor denied that the contract entered into with the company is a sham contract with a view to deprive the canteen workmen of the benefits enjoyed by the regular workmen of the company. The contractor denied that the deductions were made from the salary of the canteen workmen towards the thrift fund contribution and stated that the said scheme was applicable only to the permanent workmen of the company. The contractor stated that canteen workmen are not the workmen of the company and that the work done by them was all together different from the work done by the workmen of the company, and further denied that the running of the canteen was under its direct administration and supervision. The contractor stated that the canteen workmen were retrenched consequent upon signing of the settlement with the workmen and the retrenchment was according to the law, and further that the dispute as regards the retrenchment is pending before this Tribunal in Ref. No. IT/61/2002. The contractor stated that no relief can be granted to the workmen in the present dispute, and the reference is liable to be rejected. The union thereafter filed rejoinder at Exb. 8.

6. On the pleadings of the parties following issues were framed at Exb. 10.

1. Whether the Party I proves that the contract between the Party II (1) M/s. Icarus Foods and Farm and the Party II (2) M/s. MRF Ltd., is a sham and bogus contract ?

2. Whether the Party I proves that the workmen namely the canteen workers Shri Ragoba Fallari, Shri Santosh Sangodkar and Shri Subhas Naik are entitled for absorption by the Party II (2) M/s. MRF Ltd., w.e.f., 1-10-1996 with appropriate fitment in the pay scales ?

3. Whether the Party II (1) prove that the reference is not maintainable for the reasons stated in para (a) to (d) of the written statement ?

4. Whether the Party II (2) proves that the reference is not maintainable for the reasons stated in para 1(a) to 1(d) of the written statement ?

5. Whether the workmen are entitled to any relief ?

6. What Award ?

7. My findings on the issues are as follows:

Issue No. 1: In the negative.
Issue No. 2: In the negative.
Issue No. 3: In the negative.
Issue No. 4: In the negative.
Issue No. 5: In the negative.
Issue No. 6: As per order below.

REASONS

8. *Issue Nos. 3 and 4:* Both these issues are taken up together and they are decided first because the said issues relate to the maintainability of the reference. The company as well as the contractor have challenged the locus standi of the union to raise the dispute on behalf of the contract workers. Adv. Shri Sardessai, the learned counsel for the company has submitted that looking at the nature of the reference only the employees of the contractor could have raised the dispute and not by the union of the employees of the principal employer that is, the company. He has submitted that the union could have raised the dispute if the demand was for abolition of the contract system which is not the case in the present case. He has submitted that as per the order of reference the demand is for absorption of the contract workers who were working in the canteen on the ground that the contracts entered between the company and the contractor are the sham and bogus contracts, and therefore the dispute could have been raised only by the contract workers and not by the union which is the union of the employees of the company. He has submitted that the constitution of the union has been produced at Exb. E-7 and as per the clause 2(1) of the said constitution the object of the union is to organise and unite the persons employed in MRF Unit. He has submitted that as per clause 3 of the said constitution only the above persons are entitled to be the members of the said union. He has submitted that therefore as per the constitution of the union only the persons who

are employed by the company in its factory can be the members of the said union and the contract workers are not entitled to be the members of the said union. He has submitted that the receipts produced by the union inrespect of the membership of the canteen workers are the fake receipts. He has submitted that the evidence on record namely the letters dated 23rd December, 1999 Exb. E-1; 30th December, 1999 Exb. E-2; 30th December, 1999 Exb. E-3; 7th January, 2000 Exb. E-4 and 8-1-2000 Exb. E-5 show that the members of Goa MRF Employees Union had left the said union and had become the members of another union namely Mumbai Mazdoor Sabha. He has submitted that since Mr. Rohidas Naik, the President of the union had denied this fact, he should have produced the membership register or the receipts to show that substantial number of the workers are the members of his union and they had supported the said dispute. In support of his this submission he has relied upon the judgment of the Supreme Court in the case of Workmen, Indian Express News Papers (P) Ltd., v/s The Management, Indian Express News Papers (P) Ltd., reported in AIR 1970 SC 737. He has submitted that the union has failed to prove that it has the authority or the locus standi to espouse the present dispute and since the dispute referred is not an industrial dispute, the reference is not maintainable. Adv. Shri Rohit Bras, the learned Advocate for the Contractor submitted that he is adopting the arguments advanced by Adv. Shri G. K. Sardessai.

9. Adv. Shri Menezes, the learned counsel for the union submitted on the other hand that neither the company nor the contractor had challenged the authority or the locus standi of the union to raise the dispute on behalf of the canteen workers, and therefore they cannot be allowed to challenge the same now in these proceedings. He has submitted that as per the constitution of the union the contract workers are entitled to become the members of the union, and there is no bar to the same. He has submitted that the dispute which has been raised is not an individual dispute but it is a collective dispute and the workers have the community of interest in the said dispute. He has submitted that the resignation of the workers from the membership of the union has not been proved and even otherwise there is no bar for dual membership. He has submitted that the union has produced the list of the members at Exb. W-36 who were present at the General Body Meeting held on 26-1-2003 for electing the members to the Managing Committee which list shows that about 421 members were present for the meeting. He has submitted that the above fact shows that the substantial number of workers are the members of the union. He has submitted that the union has signed settlements with the contractor in respect of the canteen workers which shows that the union has the representative character and has the authority/locus standi to espouse/raise the dispute on behalf of the canteen workers.

10. The first question that arises is whether the employer can challenge the maintainability of the reference on the ground that the dispute referred is not an industrial dispute as the union namely the Goa MRF Employees Union has no locus standi or authority to raise the dispute on behalf of the canteen workers. Adv. Shri Menezes the learned counsel for the union has contended that in the Writ Petition filed by the union neither the company nor the contractor challenge the authority of the union to raise the dispute on behalf of the canteen workers, and therefore they cannot be allowed to raise this objection in the present proceedings. Adv. Shri Sardessai has relied upon the judgment of the Bombay High Court in the case of Iqbal Ahmed Kamaruddin v/s P. L. Muzumdar reported in 1992(64) FLR 827. In para. 8 of its judgment has held as follows:

> If what is referred to a Tribunal/Labour Court is not an industrial dispute it is always open to a party to show to the forum that the dispute referred for adjudication though purported to be an industrial dispute, is in reality not an industrial dispute at all. This has always been recognised as an exception to the general rule postulated in Sec. 10(4). It is therefore always permissible for an employer to raise an issue as to whether what has been referred is an industrial dispute at all and there can be no question of the Tribunal being bound by the order of reference. It is a settled law that the appropriate Government makes a reference upon a prima facie view of the matter as to the existence or apprehension of an industrial dispute; it is open to the parties to show that what is referred is not in reality an industrial dispute at all."

The order of the Hon'ble Bombay High Court, Goa Bench dated 18th September, 2002 passed in Writ Petition No. 374 of 1996 has been produced at Exb. E-49. From the said order it can be seen that the issues were kept open by the Hon'ble High Court. The union was permitted to make an appropriate representation to the Government and the Government was asked to decide whether to refer the dispute for adjudication or not after hearing the parties, that is, the company and the contractor, and on receipt of the reference this Tribunal was asked to dispose of the same. In my view as per the principles laid down by the Hon'ble Bombay High Court in the case of Iqbal Ahmed Kamruddin (supra) an employer is entitled to raise all the possible defences in the reference, and therefore the company and the contractor are entitled to raise an objection that the union has no locus standi to raise the dispute on behalf of the canteen workers and as such there is no industrial dispute. Merely because no such objection was raised in the Writ Petition, it does not mean that no such objection can be taken in the reference before the Tribunal which is a proper forum.

11. The company has raised the contention that the constitution of the union does not permit the canteen workers to be the members of the said union, and therefore the union is not entitled to raise the

present dispute on behalf of the said workers. The company has referred to clause 2(1) and 3 of the said constitution. I have gone through the said constitution of the union which is produced at Exb. E-7. Clause 2 of the constitution is an object clause. As per clause 2(i) the object of the union is to unite the person employed in the MRF Unit in Goa, Daman and Diu and regulate their relation with their employers. As per clause 3, any person referred in clause 2(i) is entitled to be a member of the union. The word used in clause 2(i) is "employed in MRF Unit" and not "employed by MRF in MRF Unit." Also, the word used is MRF Unit and not MRF factory. What is MRF Unit has not been specified. It cannot be given a restrictive meaning so as to mean only MRF factory. The canteen of MRF is admittedly, a statutory canteen. Therefore, in my view the canteen also is to be considered as a part of the Unit of MRF. This is also evident from the words "and to regulate their relation with their employers". If the object was to restrict the membership only to the persons employed by MRF, the words "employers" would not have been used. This shows that the membership was open also to the persons employed through contractors, in MRF. Therefore in my view the canteen workers could become the members of the Goa MRF Employees Union as per the constitution of the said union.

12. The company and the contractor have raised the contention that considering the nature of the dispute referred only the employees of the contractor could have raised the dispute and not by the union of the employees of the principle employer, that is, the company. It is the contention of the company that the union in the present case could have raised the dispute if the demand was for abolition of the contract system under the Contract Labour (Regulation & Abolition) Act, 1970. In the present case the dispute which has been referred to this Tribunal for adjudication is regarding the demand of the union for absorption of the canteen workers by the company on the ground that the contracts entered into between the company and the contractor are the sham and bogus contracts. Thus the main issue involved in the present case is whether the contracts are sham and bogus. The dispute referred is not regarding the demand for abolition of the contract system. In the case of Gujrat Electricity Board, Thermal Power Station, Ukai, Gujrat v/s Hind Mazdoor Sabha and anr., reported in 1995 I CLR 967, the Supreme Court has held that if the contract is sham or not genuine, the workmen of the so-called contractor can raise the industrial dispute for declaring that they were always the employees of the principal employer and for claiming the appropriate service, conditions. The Supreme Court has held that when such dispute is raised, it is not a dispute for abolition of the contract labour and hence the provisions of Sec. 10 of the Act will not bar either the raising or the adjudication of the dispute. The Supreme Court has held that when such dispute is raised the industrial adjudicator has to decide whether the contract is sham or genuine and that it is only if the adjudicator comes to the conclusion that the contract is sham, that he will have jurisdiction to adjudicate the dispute. The Supreme Court has further held that, if however, he comes to the conclusion that the contract is genuine, he may refer the workmen to the appropriate Government for abolition of the contract labour under Sec. 10 of the Act and keep the dispute pending if the dispute is espoused by the direct workmen of the principal employer and that if the workmen of the principal employer have not espoused the dispute the adjudicator after coming to the conclusion that the contract is genuine, has to reject the reference, the dispute being not an industrial dispute within the meaning of Sec. 2(k) of the I. D. Act. Therefore as per the above judgment of the Supreme Court in the case of Gujrat Electricity Board (supra) the dispute that the contract is sham or bogus and consequently the demand for absorption of the contract workmen can be raised by the contract workmen themselves or by the union of the employees of the principal employer. This part of the judgment has not been overru'ed by the Supreme Court in the case of Steel Authority of India Ltd., and others v/s National Union Waterfront Workers and others reported in (2001)7 SCC pg. 1. This being the case the union, namely Goa MRF Employees is entitled to raise present dispute. Besides the workmen in the present reference are the members of the said union.

13. The company has raised the contention that the evidence on record namely the letters dated 23-12-1999 Exb. E-1, 30-12-99 Exb. E-2, 30-12-1999 Exb. E-3, 7-1-2000 Exb. E-4 and 8-1-2000 Exb. E-5 show that the substantial number of workers had resigned from the union and had become the members of Mumbai Mazdoor Sabha. The company has contended that the union has not produced the membership register or the membership fee receipts to show that substantial number of workers were its members. The letter dated 23rd December, 1999 Exb. E-1 is the letter written by Shri R. J. Mehta, the President of Mumbai Mazdoor Sabha to the company. In this letter Shri Mehta has stated that overwhelming majority of the workmen after resigning enmasse from the membership of Goa MRF Employees Union have accepted the membership of Mumbai Mazdoor Sabha, and that hence forth the Sabha shall be the sole bargaining agent on behalf of the workmen of the company. This letter was shown to Shri Rohidas Naik, the President of the Union in his cross examination and he admitted the receipt of the said letter. He stated that Mr. R. J. Mehta has made a wrong statement that the overwhelming majority of the workmen had resigned from the membership of his union and had become the members of Sabha. He denied that he and the other members had resigned from the union. He stated that the members of his union were also the members of Mumbai Mazdoor Sabha. He stated that Mr. Mehta has wrongly stated that the Sabha shall be the sole bargaining agent on behalf of the workmen of the company. He has produced the copy of the letter dated 8-1-2000 at Exb. E-5 written by him to the President of Mumbai Mazdoor Sabha denying that he has resigned from Goa MRF Employees Union and stating that he continues to be the member of the said union alongwith the membership of Mumbai Mazdoor Sabha. There is no evidence to show that the workers had resigned from

the membership of the union. Shri Rohidas Naik has stated in his deposition that his union had held a General Body Meeting on 26-1-2003 for electing the members of the Managing Committee. He has produced the list of the members at Exb. W-36 who were present for the said meeting. The said list shows that total 421 members were present for the General Body Meeting. The said list mentions the token number of each member and carries his signature. In his cross examination suggestion was put to him that no General Body Meeting was held on 26-1-2003 and that list Exb. W-36 is a fabricated list. The Union however has examined Shri Santosh Sangodkar, the workman in the present reference, who has corroborated the statement of Shri Rohidas Naik. He has stated that the General Body meeting of the union was held on 26-1-2003 and that he had attended the said meeting. He has admitted the list Exb. W-36 and stated that his name figures at Sr. No. 104 and he has identified his signature on the said list. Only suggestions were put to him on behalf of the contractor in his cross examination that no General Body Meeting was held on 26-1-2003 and that the list is fabricated which suggestions he denied. Suggestion was put to Shri Rohidas Naik on behalf of the company in his cross examination that in the year 1996 all the canteen workers including the three workmen in the present reference became the members of M/s. Icarus Foods and Farms Workers Union which suggestion was denied by him. However no suggestion to this effect was put to Shri Santosh Sangodkar, one of the tree workmen in the present reference. The only suggestion which was put to him was that he was not the member of Goa MRF Employees Union. No evidence whatsoever as been produced by the company or by the contractor to prove that the canteen workers including the workmen in the present reference were the members of Icarus Foods and Farms Workers Union. The workman Shri Santosh Sangodkar however has stated that he has been paying the membership fee of Goa MRF Employees Union since 1989 and he has produced the receipts issued by the said union towards the payment of membership fee in the year 1993, 1997, 1999, 2000, 2002 and 2003 at Exb. W-43 colly. The only suggestion which is put to him in his cross examination is that the said receipts are back dated and were issued to him in the month of October, 2003. There is no supporting evidence to this suggestion. The above evidence proves that the Goa MRF Employees Union is existing and it has substantial number of workers as its members. As mentioned earlier there is no evidence to show that large number of workers had resigned from the membership of the union. I would not like to go into the question whether dual membership is permissible or not as the issue involved in this case is whether the union namely the Goa MRF Employees Union has the locus standi to raise the dispute or not. Adv. Shri Sardessai, the learned counsel for the company has relied upon the judgment of the Supreme Court in the case of Indian Express News Papers (P) Ltd., (supra). In this case 31 working Journalists out of 131 working with Indian Express News Papers (P) Ltd., were the members of the Delhi Union of Journalists which was not the union of the working Journalists employed in the said company and the said union took up the dispute of the two employees working with the said company. The Supreme Court held that since about 25 percent of the working Journalists working with the company were the members of the said union, it gave the representative character to the said union. In my view this judgment of the Supreme Court cannot be applied to the present case. The union namely Goa MRF Employees Union is not a general union or an outside union but it is the union of the employees of the company, that is, it is an internal union which in other words means it is an union of the establishment of MRF Company. Therefore the issue of representative character will not come in the present case. It has been already held by me earlier that as per the judgment of the Supreme Court in the case of Gujrat Electricity Board, (supra) the union namely Goa MRF Employees Union has the authority to raise the dispute of the nature involved in the present case.

14. The company has submitted that the contract with the contractor expired in October, 1997 and the services of the workmen were terminated by the contractor. The company has submitted that in view of the above the dispute raised by the workmen regarding termination of their service is required to be decided first. I do not agree with this submission of the company. The present dispute is regarding the absorption of the workmen by MRF Company with effect from 1-10-96 that is much prior to the termination of service of the workmen. In my view if the demand for absorption is granted, the dispute regarding the termination of service of the workmen which is by the contractor will not survive and therefore there is no question of deciding the dispute of termination of service first.

In the circumstances, I hold that the company as well as the contractor have failed to prove that the union namely Goa MRF Employees Union has no locus standi to raise the present dispute. I therefore answer the issue Nos. 3 and 4 in the negative.

15. *Issue No. 1:* Adv. Shri Menezes, the learned counsel for the union submitted that the canteen which is existing in the MRF premises is a statutory canteen and the work in the said canteen is of perennial nature. He submitted that though the canteen contractors changed, the workers employed in the canteen continued to work in the said canteen. He submitted that the company ran the canteen through the contractors only to deny the canteen workers the benefits enjoyed by the permanent workers of the company. He submitted that since the canteen is maintained by the company is a statutory canteen under Sec. 46 of the Factories Act, the canteen employees are in fact to be the employees of the company and as such they are entitled to absorption by the company in its service. He submitted that the salary slips of the permanent workers have been produced to show that the salary paid to the permanent workers is much higher than the salary paid to the canteen workers and the

benefits enjoyed by the permanent workers are much better than the benefits enjoyed by the canteen workers. He submitted that the above facts prove that the company has resorted to unfair labour practice by entering into contracts with the contractors for running the canteen. He submitted that the contracts which are entered into with the contractor by the company and which have been produced show that the control over the running of the canteen was exercised by the company and the contractor was reimbursed by the company in most respects. He submitted that the work of running the canteen was supervised by the officers of the company and this is evident from the bills submitted by the contractor as in the said bills Mr. Anthony D'Souza the employee of the company has signed as canteen supervisor. He submitted that any explanation if at all ought to have come from Mr. Anthony D'Souza but he has not been examined by the company. He submitted that the evidence of the contractor Shri T. J. Josh shows that no profit was made by him by running the canteen, and that he was reimbursed by the company towards the every expenses made and cost incurred. He submitted that the control over the required manpower was with the company. He submitted that in the sales tax returns produced at Exb. E-46 the contractor Mr. John has stated that the canteen is run on "no profit basis" which shows that he was running the canteen only for name sake. He submitted that the contracts show that the contractor was being paid a fixed amount every month by the company as service charges and in every contract the terms and conditions remained almost the same except that the amount of service charges changed. He submitted that evidence on record shows that the company's person was remaining present at the time when the salary was being paid to the canteen workers. He submitted that the facts mentioned above and the evidence produced by the union proves that the entire control over the running of the canteen was with the company and it was as if the canteen was being run by the company and the contractor was for the name sake. He submitted the facts discussed above and the evidence on record sufficiently proves that the contracts entered into by the company with the contractor are the sham and bogus contracts, and they are signed only to deprive the canteen workers of the benefits enjoyed by the permanent workers of the company. He submitted that the company employed 9 workers who were working in the canteen and though there is no evidence that they were absorbed by the company in their employment their past service in the canteen was considered. He submitted that this fact shows that though on record the canteen workers were not the workers of the company, the company always considered them to be their workers. In support of his contention that the contracts signed between the company and the contractor are sham and bogus he relied upon the judgments of the Supreme Court in the case of (1) Steel Authority of India Ltd., and others v/s National Union Waterfront Workers and others reported in (2001) 7 Sec. 1;(2). Mishra Dhatu Nigam Ltd., & Others v/s M. Venkatataiah and others reported in (2003) 7 SCC 488; (3) M. M. R. Khan and others v/s Union of India and others reported in 1990 (suppp) SCC 191; (4) Gujrat Electricity Board, Thermal Power Station, Ukai, Gujrat v/s Hind Mazdoor Sabha and others reported in (1995) 5 SCC 27; (5) Parimal Chandra Raha and others v/s Life Insurance Corporation of India and others reported in 1995 Supp. (2) SCC 711; (6) Indian Petrochemicals Corporation Ltd., and another v/s Shramik Sena and others reported in (1999) 6 SCC 439; (7) Indian Overseas Bank v/s I.O.B. Staff canteen workers union and another reported in (2000) 4 SCC 245; (8) G. B. Pant University of Agriculture & Technology, Pantnagar, Nainital, v/s State of U. P. and others reported in (2000) 7 SCC 109; (9) National Thermal Power Corporation Ltd., v/s Karri Pothuraju and others reported in (2003) 7 SCC 384; (10) VST Industries Ltd., v/s VST Industries Workers Union and another reported in (2001) 1 SCC 298; (11) Union of India and others v/s M. Aslam and others reported in (2001) 1 SCC 720; (12) Bharat Fritz Warner Ltd., v/s State of Karnataka reported in (2001) 4 SCC 498; (13) Ram Singh and others v/s Union Territory, Chandigarh and others reported in (2004) 1 SCC 126.

16. Adv. Shri G. K. Sardessai, the learned counsel for the company submitted that the exercising of the supervision and control which is referred to in the case of Indian Petrochemicals Corporation Ltd., (supra) is the supervision and control over the canteen workers employed by the contractor and not the supervision and control over the canteen contractor to see that the terms of contract are observed by the contractor and also to see that he abides by the provisions of law. He submitted that there is no pleading from the union even in rejoinder regarding the exercising of the supervision by the company on the canteen workers. He submitted that the union has not brought on record any evidence about the nature of the supervision carried out by the company. He submitted that from the evidence on record and more particularly from the evidence of the workman Shri Santosh Sangodkar, it is proved that there is the relationship between the canteen contractor and the canteen workers and not between the canteen workers and the company. He submitted that it has come in the evidence of Shri Santosh Sangodkar that the salary of the canteen workers was paid by the contractor, he was maintaining the wage register, the right of dismissal from service of the canteen workers and the right of sanctioning of their leave was with the contractor. He submitted that all the above facts go to show that contractor was exercising control over the canteen workers and the employer-employee relationship was between him and the canteen workers and not between the company and the canteen workers. He submitted that in the present case the contractor Mr. T. J. John has examined himself and from his evidence it is evident that the present case is covered by the judgment of the Supreme Court in the case of Hari Shankar Sharma and ors., v/s M/s. Artificial Limbs Manufacturing Corporation & Ors., reported in 2002 I CLR 13. He submitted that on applying the principles laid down in the said case it shows that the contracts signed by the company with

the contractor are the genuine contracts and not sham and bogus contracts as contended by the union. He submitted that though M/s. Artifical Limbs Manufacturing Corporation case (supra) is two judges bench decision and Steel Authority of India Ltd., (supra) is a Five Judges Bench decision, still the judgment in M/s. Artificial Limb case is liable to be followed as, when there are two judgments of the same court on an issue, the judgments which according to the court is better at law should be followed. In this respect he relied upon the judgments of the Bombay High Court in the case of Sadanand Sahadeo Rawool v/s Sulochana Sadanand Rawool reported in AIR 1989 Bombay 220, and in the case of Rambhau v/s Maharashtra State Road Transport Corporation reported in 1992 II LLJ 872. He submitted that the union is not entitled to raise the contention that since under Sec. 46 of the Factories Act, the company is liable to maintain a canteen and that infact the company maintains the canteen under the said provision, the employees of the canteen contractor are deemed to be the employees of the company, because vis a vis the terms of the reference, Sec.46 of the Factories Act does not come into picture. He submitted that the demand of the union for absorption of the workmen by the company is based on the allegation that the contracts signed between the company and the contractor are the sham and bogus contracts and not in terms of Sec. 46 of the Factories Act, as can be seen from the terms of the reference. He submitted that the Tribunal cannot travel beyond the scope of the reference. In support of his this contention he relied upon the judgments of the Supreme Court in the case of M/s. India Tourism Development Corporation v/s Delhi Administration and others reported in 1982 LIC 1309; Pottery Mazdoor Panchayat v/s Perfect Pottery Company Ltd., and others reported in 1979 I LLN 336; Indian Hume Pipe Company Ltd., v/s Their workmen reported in 1969 I LLJ 242; Sindhu Resettlement Corporation Ltd., v/s Industrial Tribunal, Gujrat and others reported in 1968 I LLJ 834; Moolchand Kharati Ram Hospital K Union v/s Labour Commissioner reported in 2001 I CLR 29.

17. Adv. Shri Rohit Bras, the learned counsel for the contractor submitted that for arriving at the decision whether the contract is sham and bogus, the real test is who is in the control of the working of the canteen. He submitted that the statement of the contractor in his affidavit in evidence which shows that he was qualified to run the canteen, is not denied by the union. He submitted that the evidence of the contractor Mr. John shows that he was exercising control over the canteen workers and all the benefits to them were given by him. He submitted that the contractor was given separate code number by the office of the Provident Fund Commissioner as also he was given separate sales tax registration number. He submitted that it has come in evidence that Mr. Rajmohan was the Manager appointed by the contractor to manage the running of the canteen and the company had nothing to do with the running of the said canteen. He submitted that the canteen employees were employed by the contractor and as per the terms of the contract it was the responsibility of the contractor to employ workmen to run the canteen. He submitted that from the evidence on record and more particularly from the cross examination of the workman Shri Santosh Sangodkar it is clear that the contractor had the administrative control over the canteen workers. He submitted that it has come in his evidence that the leave to the canteen workers was being granted by the contractor and that grievances were being made by them to the contractor. He submitted that it has come in evidence that the canteen workers had formed their own union called Icarus Foods and Farms Workers Union and the settlement was signed by the said union with the contractor. He submitted that there is no evidence to show that the said union had at any time any dealing with the company nor the company was a party to the settlement signed between the said union and the contractor. He submitted that all the terms and conditions of the contract are complied with by the contractor. He submitted that there is no substance in the contention raised by the union that the contracts signed between the contractor and the company are the sham and bogus contracts.

18. I shall first deal with the contention of the union that since the canteen is maintained by the company under Sec.46 of the Factories Act, the canteen employees are deemed to be the employees of the principal employer, that is, the company and therefore they are entitled for absorption by the company in its service. The company has objected to the raising of this contention by the union on the ground that the said contention travels beyond the scope of the reference. I find much force in the objection raised by the company. It is well settled that the Tribunal while deciding the dispute cannot travel beyond the terms of the reference. Adv. Shri Sardessai, the learned counsel for the company has relied upon the judgments of the Supreme Court in the case of M/s. India Tourism Development Corporation (supra), Indian Hume Pipe Company Ltd., (supra), Sindhu Resettlement Corporation Ltd., (supra) and Moolchand Kharati Ram Hospital K. Union (supra). I have gone through the above judgments of the Supreme Court. The gist of the said decisions is that the Tribunal has to decide the dispute specifically referred to it and it cannot go beyond the terms of the reference. In the case of Perfect Pottery Company Ltd., (supra) the Supreme Court has held that the jurisdiction of the Tribunal in industrial disputes is limited to the points specifically referred for its adjudication and to matters incidental thereto and the Tribunal cannot go beyond the terms of the reference made to it. In the present case as per the terms of the reference, the demand for absorption of the three canteen workers by the company has been made by the union on the ground that the contract between the company and the canteen contractor is a sham and bogus contract. Therefore as per the terms of the reference this Tribunal is required to decide whether the Contract between the company and the canteen contractor is sham and bogus. Therefore to decide whether the three canteen workers are entitled to absorption by the company on the ground that the canteen of the company is a statutory canteen under

Sec. 46 of the Factories Act and hence the canteen workers are deemed to be the employees of the company, would amount to travelling beyond the scope of the terms of the reference which is not permissible under the law. I therefore hold that the union is not entitled to raise the contention in this reference that since the canteen of the company is a statutory canteen under Sec. 46 of the Factories Act, the canteen workers are deemed to be the employees of the company and therefore they are entitled for absorption by the company in its service. In any event the Supreme Court in the case of Indian Petrochemicals Corporation Ltd., (supra) has held that the employees of the statutory canteen managed by the contractor do not ipso facto become the employees of the establishment, that is, the principal employer, for all purposes but they are deemed to be the employees of the establishment only for the purposes of the Factories Act.

19. Now the question for consideration is whether the contracts signed between the company and the contractor for running the canteen are the sham and bogus contracts. As per the judgment of the Supreme Court in the case of Gujrat Electricity Board (supra) the question of deciding whether the canteen workers in the present case will be entitled to the absorption by the company will arise only if this Tribunal comes to the conclusion that the contract between the company and the contractor is a sham and bogus contract, and if this Tribunal comes to the conclusion that the contract is genuine, the reference is liable to be rejected. In support of its case the union has examined its President Shri Rohidas Naik and the workman Shri Santosh Sangodkar whereas the company has examined Shri Claudio Fernandes, the Manager, Human Resources and the Contractor Shri T. J. John has examined himself. It is not in dispute that the canteen of the company is a statutory canteen which is required to be maintained under Sec. 46 of the Factories Act. It is also a fact that the company had its canteen right from the year 1973 and the said canteen was run through the contractors. This has come on record in the evidence of the company's witness Shri Claudio Fernandes. The employment of the contract labour for running the canteen was not prohibited by the Government under the provisions of Contract Labour (Regulation and Abolition) Act 1970. Therefore the company could run the said canteen through the contractors. The company's witness Shri Claudio Fernandes has stated in his cross examination that the persons who were running the canteen during the period 1973 to 1983 were one Mr. More, Mr. D'Souza, Mr. Tony and Mr. Rane. He stated that the company does not have the list of the canteen workers working in the canteen during the period 1973 to 1983. He however denied the suggestion that the canteen workers continued to work in the canteen irrespective of the fact as to who was the canteen contractor. He has stated that contracts were signed by the company with the contractor M/s. Icarus Foods and Farms on 1-5-1983 in the year 1986 on 1-4-1988, 26-12-91, 15-3-93, 1-10-93 and 30-9-94 for running the canteen. He has stated that no formal contract was signed after September 1994 but vide letter dated 1-10-95 the contract was entered for 24 months till October 1997. The Contractor Mr. T. J. John, the proprietor or M/s. Icarus Foods and Farms has examined himself. He has stated that in early 1983 he learnt that the company was in search of a catering contractor to run the canteen for their employees and on his offer to run the said canteen the contract was offered to him by the company vide letter dated 7th March, 1983 and that a formal contract was signed for three years from May, 1983 to April, 1986 with the company and from then he started running the said canteen under regular contracts till 17-2-97. He has stated that he was granted licence under Contract Labour (Regulation and Abolition) Act, 1970 (for short, "Contract Labour Act") and Goa, Daman and Diu Prevention of Food Adulteration Rules, 1982. The union has not disputed that the contractor was granted licence under the Contract Labour Act. The licence issued by the Directorate of Health Services under Goa, Daman and Diu Prevention of Food Adulteration Rules has been produced at Exb. E-33. The said licence shows that it is issued in the name of Shri T. J. John for manufacturing for sale/storage/distribution of cooked prepared food at the industrial canteen of MRF Ltd. The company has produced the certificate of Registration at Exb.E-75 colly issued to it by the Registering Officer under the Contract Labour Act. In the said certificate the name of the canteen contractor is mentioned as Icarus Foods. The above documents show that there was compliance with the provisions of law on the part of the company and the contractor in running the canteen.

20. The Contracts/Agreements signed between the employer and the Contractor M/s. Icarus Foods and Farms for running the canteen have been produced. The contract dated 1-5-1983 has been produced at Exb. E-29; the contract dated 1-10-93 has been produced at Exb.E-69; the contracts dated 15-3-93, 1-10-92, 30-9-94 have been produced at Exb.W-37, W-38, W-39 respectively. The union has also produced the letter dated 1-10-95 at Exb. W-41 written by the company to the contractor to continue the running of the canteen for a further period of 24 months from 1-10-95 to 30-9-97 under the existing terms and conditions. According to the union all these contracts are sham and bogus, because the said contracts show that the control over the running of the canteen was exercised by the company, more particularly being that the running of the canteen was being supervised by the officers of the company and the contractor was reimbursed by the company in most respects. In support of its this contention the union has relied upon the various clauses of the contract, which are identical in almost all the contracts, and on the evidence which has come on record through the witnesses examined by the union, the company and the contractor. The union has also relied upon various judgments of the Supreme Court, which are mentioned hereinabove. In the case of Ram Singh (supra) the contract employees had claimed relief of regularisation of other services under the Engineering Department of the Chandigarh Administration on the

ground that the work of maintaining supply of electricity being of a perennial and permanent nature they should be directly employed by the Administration. The Supreme Court held that in determining the relationship of employer employee "control" is one of the important tests but it is not the sole test, and that all other relevant facts and circumstances are required to be considered including the terms and conditions of contract. The Supreme Court held that "Integration Test" is one of the relevant tests and it is applied by examining whether the person was fully integrated into the company's concern and remained apart from and independent of it, and that the other relevant are who has the power to select and dismiss, to pay remuneration, deduct insurance contributions, organise the work, supply tools and materials and what are the mutual obligations between them. The Supreme Court further held that normally the relationship of employer-employee does not exist between an employer and a contractor and the servant of an independent contractor but where an employer retains or assumes control over the means and method by which the work of a contractor is to be done, it may be said that the relationship between employer and employee exists between him and the servants of such contractor and that in such a situation the mere fact of formal employment by an independent contractor will not relieve the master of liability where the servant is, infact, in his employment. The Supreme Court held that in that event it may be held that an independent contractor is created or is operating as a subterfuge and the employee will be regarded as the servant of the principal employer. The Supreme Court held that whether a particular relationship between employer and employee is genuine or a camouflage through the mod of a contractor is essentially a question of fact to be determined on the basis of the features of the relationship, the written terms of employment, if any, and the actual nature of employment. In the case of India Petro Chemicals Corporation Ltd. (supra) the Supreme Court held that the employees of the statutory canteen managed by the contractor are deemed to be the employees of the establishment, that is, the principal employer, only for the purposes of the Factories Act. The Supreme Court held that it has not laid down in the case of Parimal Chandra Raha (supra) that the deemed employment of the workers is for all purposes nor it is specifically held that it is only for the purpose of the Factories Act. The Supreme Court held that reading of the judgment in its entirety makes it clear that the deemed employment is only for the purpose of the Factories Act. Following the judgment in the case of Parimal Chandra Raha (supra), Reserve Bank of India v/s Workmen reported in (1996) 3 SCC 207 and M. M. R. Khan (supra) the Supreme Court held that the workmen would be the workmen of the establishment for the purposes of the Factories Act only and not for all other purposes. The Supreme Court further held that whether the canteen employees are in fact the employees of the management will depend upon the facts in each case. In the case before it, considering the material before it namely that (a) the canteen has been there since the inception of the appellant's factory (b) the Workmen have been employed for long years and despite a change of contractors, the workers continued to be employed in the canteen (c) the premises, furniture, fixture, fuel, electricity, utensils etc., have been provided for by the appellant (d) the wages of the canteen workers have to be reimbursed by the appellant (e) the supervision and control on the canteen is exercised by the appellant through its authorised officer as can be seen from the various clauses of the contract between the appellant and the contractor (f) the contractor is nothing but an agent or a manager of the appellant who works completely under the supervision, control and directions of the appellant (g) the workmen have the continuous employment in the establishment, the Supreme Court held that the workmen of the Contractor are infact the workmen of the management. In the said case the Supreme Court found that the contractor was engaged only for the purpose of record and for all purposes the workmen infact were the workmen of the management. In the case of Parimal Chandra Saha (supra) on considering the facts on record, the Supreme Court held that the canteen workers were infact the employees of the Life Insurance Corporation. The Supreme Court held so because from the facts on record it was found that (i) the canteen services were provided to the employees of the Corporation for a long time and it was the corporation who was from time to time taking steps to provide the said services (ii) the canteen committees, the co-operative societies of the employees and the contractors were acting for and on behalf of the corporation as its agencies to provide the said services and the corporation was taking active interest even in organising the canteen committees. (iii) the terms of the contract entered with the contractor showed that they were in the nature of directions to the contractor about the manner in which the canteen should be run and the canteen services as should be rendered to the employees, and even the prices of the items served, the place where they should be cooked, the hours during which and the place where they should be served were dictated by the corporation (iv) the corporation had reserved the right to modify the terms of the contract unilaterally and the contractor had no say in the matter (v) almost all the workers of the canteen were working in the canteen continuously for a long time (vi) the Corporation employed the mechanism to supervise and control the working of the canteen (vii) although supervising and managing body of the canteen changed hands from time to time, the workers remained constant apart from the fact that the infrastructure for running the canteen namely the premises, furniture, electricity, water etc., was supplied by the corporation to the managing agency for running the canteen (viii) the corporation was controlling the hours during which the counter and floor service would be available to the employees by the canteen (ix) the employees of the corporation were all along making the complaints about the poor or inadequate service rendered by the canteen to them, only to the Corporation and the Corporation was taking steps to remedy the defects in the canteen

services (x) whenever there was a temporary break--down in the canteen service, on account of agitation or of strike by the canteen workers, it is the corporation who was taking active interest in getting the dispute resolved and the canteen workers also looked upon the corporation as their real employer and joined it as a party to the industrial dispute raised by them. From the above facts the Supreme Court found that the contractors, canteen committees and the co-operative society of the employees engaged from time to time were in reality the agencies of the corporation they were only a veil between the corporation and the canteen workers. In the case of M M R Khan (supra) the statutory canteens were in existence at their respective places continuously for a number of years, the appointment of the employees was made by the department through the agency of the committee/ /society as the case may be, the premises as well as paraphernalia for the canteens was provided by the railway administration and belonged to it, the canteen employees were in service uninterruptedly for many years, their wages were reimbursed in full by the railway administration, the entire running the canteens including the work of the employees was subject to the supervision and control of the agency of the railway administration whether the agency is the staff committee or the society, and the number and category of the staff engaged in the canteen was controlled by the administration. Considering all the above factors the Supreme Court came to the conclusion that the employees in the statutory canteens of the railways were to be treated as the employees of the railways. This judgment was considered by the Supreme Court in the case of Indian Petrochemicals Corporation Ltd., (supra) and the Supreme Court held that on reading of the said judgment in its entirety it is clear that the deemed employment is only for the purposes of the Factories Act and that whether the canteen employees would/or in fact the employees of the management will depend upon the facts in each case.

21. In the case of Steel Authority of India Ltd., (supra) the Supreme Court summarised its finding in para 125 of its judgment. The findings given at para 125 (s) of the judgment are relevant for the present case and the union has also relied upon the same. In this para the Supreme Court has held as follows: "On issuance of prohibition notification under Sec. 10(1) of the CLRA Act prohibiting employment of contract labour or otherwise, in an industrial dispute brought before it by any contract labour in regard to conditions of service, the industrial adjudicator will have to consider the question whether the contractor has been interposed either on the ground of having undertaken to produce any given result for the establishment or for supply of contract labour for work of the establishment under a genuine contract or is a mere ruse/camouflage to evade compliance with various beneficial legislations so as to deprive the workers of the benefit thereunder. If the contract is found to be not genuine but a mere camouflage, the so-called contract labour will have to be treated as employees of the principal employer who shall be directed to regularise the services of the Contract Labour in the establishment concerned subject to the conditions as may be specified by it for that purpose in the light of para 6 above". In para 126 the Supreme Court held that the expression "industrial adjudicator" is used by design as the determination of the aforementioned questions require enquiry into the disputed question of facts which cannot conveniently be made by the High Court in exercise of jurisdiction under Article 226 of the Constitution, and therefore in such cases the appropriate authority to go into those issues will be the Industrial Tribunal/Court whose determination will be amenable to judicial review. In the present case the question of deciding whether the canteen workmen are automatically entitled to the absorption in the establishment of the company on abolition of Contract Labour in terms of Sec. 10 of the CLRA Act does not arise because there is no abolition of the contract labour in the canteen of the company by the Government nor the demand of the union is for the abolition of the contract labour system in the company's canteen.

22. Adv. Shri Sardessai, the learned counsel for the company has relied upon the judgment of the Supreme Court in the case of M/s. Artificial Limbs Manufacturing Corporation & Ors., (supra). In this case the Supreme Court negativating the submissions made on behalf of the workmen that because the canteen had been set up pursuant to a statutory obligation under Sec. 46 of the Factories Act, the canteen employees had become the employees of the company, held that it cannot be said as an absolute proposition of law that whenever in discharge of a statutory mandate, a canteen is set up or other facility provided by an establishment, the employees of the canteen or such other facility become the employees of that establishment. The Supreme Court held that where it is left to the discretion of the concerned establishment to discharge its obligation of setting up a canteen either by way of direct recruitment or by employment of a contractor, it cannot be postulated that in the latter event, the persons working in the canteen would be the employees of the establishment. In this case the Labour Court had on analysing the evidence found that the workmen had failed to prove that the company had exercised control or supervision over the employees of the contractor and therefore the court held that the workmen were not the employees of the company. The Supreme Court held that the findings of the Labour Court were not perverse. The Supreme Court held that merely because there was compliance of the rules framed under Factories Act 1946, by providing the equipments, accommodation, furniture and for the rate at which the food stuffs would be sold at the canteen by the contractor would not necessarily mean that the employer was running the canteen through the agency of the contractor. The Supreme Court found that the company had no say as to who should be employed by the contractor nor the method of recruitment to be followed by the contractor; there was no obligation on the contractor to employ the

persons who had served under earlier contractors, and even if it was so it would not necessarily mean that those employees were the employees of the establishment. The Supreme Court also found that the contractor in his cross examination had stated that he used to supervise and control his employees and pay their salaries and the workmen had also stated that their salaries were paid by the contractor, the raw materials were brought by the contractor, the company had no hand in selection of the employees of the canteen; the prescribed procedure for appointing the employees of the company did not apply to them, nor the company record their attendance. Considering all the above factors it was held that the company did not exercise any control or supervision over the employees of the contractor. Adv. Shri Menezes, the learned counsel for the union has sought to argue that the judgment of the Supreme Court in the case of Steel Authority of India Ltd., (supra) is binding and not its judgment in the case of Artificial Limbs Manufacturing Corporation (supra), because the later one is a two judges bench decision whereas the former one is a five judges bench decision. It has been contended by Adv. Shri Menezes that in Steel Authority of India case the Supreme Court has held in para. 107 that when contractor is engaged to run a statutory canteen the contract labour would be the employees of principal employer. Adv. Shri Sardessai, the learned counsel for the company has relied upon the judgment of the Bombay High Court in the case of Sadanand Sahadeo Rawool (supra) in support of his contention that if there are conflicting decisions the court should choose that with which it agrees. In my view this judgment of the Bombay High Court may not be applicable to the present case because it is a case where the conflicting judgments were of the single judges and therefore the High Court held that the court may choose that judgment what agrees with its sense of fairness. Even then, in Steel Authority of India Ltd., (supra) the Supreme Court did not over rule its decision in the case of Indian Petro Chemicals Corporation. This case was considered by the Supreme Court in the Steel Authority of India Ltd., case. The Supreme Court in the case of Indian Petro Chemicals Corporation considered its judgments in the case of Parimal Chandra Raha (supra) Reserve Bank of India and M. R. Khan (supra) and held that the employees of the statutory canteen managed by the contractor are deemed to be the employees of the establishment, that is, the principal employer only for the purposes of the Factories Act and not for all purposes and that whether the canteen employees are infact the employees of the management will depend upon the facts in each case. The Supreme Court further held that it has not laid down in the case of Parimal Chandra Saha (supra) that the deemed employment of the workers is for all purposes and that reading the judgment in its entirety makes it clear that the deemed employment is only for the purposes of the Factories Act. In the case of Steel Authority of India Ltd., the Supreme Court has not held that the employees of the statutory canteen are infact the employees of the principal employer for all purposes. The Supreme Court has held that "Where in discharge of a statutory obligation of maintaining a canteen in an establishment the principal employer availed the services of a contractor the courts have held that the contract labour would indeed be the employees of the principal employer. Therefore what the Supreme Court has held is that "The courts" have held that the contract labour would be the employees of the principal employer. As mentioned earlier, the Supreme Court in the cases mentioned above namely in the case of Indian Petro Chemicals Corporation (supra) and Parimal Chandra Saha (supra) have held that the employees of the statutory canteen are the employees of the principal employer for the purposes of the Factories Act only and not for all purposes. The judgment of the Supreme Court in the case of Artificial Limb Manufacturing Corporation is subsequent to the judgment of the Supreme Court in the case of Steel Authority of India Ltd. In Artificial Limb's case the Supreme Court referred to its decision in the case of Parimal Chandra Saha and Indian Petrochemicals Corporation Ltd., and stated that in those cases it was held after considering the provisions of the Factories Act and the previous decisions on the issue that the workmen of a statutory canteen would be the workmen of the establishment only for the purpose of the Factories Act and not for all other purposes unless it was otherwise proved that the establishment exercised complete administrative control over the employees serving in the canteen. In my view therefore the Supreme Court in the case of Steel Authority of India Ltd., (supra) has not laid down that the employees of the statutory canteen are infact the employees of the Principal employer for all purposes. As per the law laid down by the Supreme Court in Indian Petro Chemicals Ltd; Parimal Chandra Saha, M. R. Khan and Artificial Limb Corporation, the workmen of the statutory canteen are deemed to be the workmen of the establishment, that is, the principal employer only for the purpose of the Factories Act and not for all other purposes. The question whether the canteen employees are infact the employees of the establishment will depend upon the facts in each case. To determine whether the contract entered between the contractor and the principal employer is a sham and bogus contract, the test to be applied is whether the principal employer was exercising the supervision and control over the running of the canteen.

23. In the case of workmen of Nilgiri Co-operative Marketing Society Ltd., v/s State of Tamil Nadu, reported in 2004 (2) L.L.N. 68, the question involved was whether the workers engaged by the contractors for the purpose of doing the work of the society such as unloading, unpacking of gunny bags, stitching the bags, weighing the auctioned potatoes and packing them into gunny bags, were workers of the society or of the contractors. The Industrial Tribunal held that there did not exist any relationship of employer and employee between the society and the concerned persons. The High Court in appeal affirmed the findings given by the Industrial Tribunal. The Supreme Court held that the determina-

tion of the question whether the concerned employees are the employees of the contractors has never been an easy task and no decision of the Supreme Court has laid down any hard and fast rule nor it is possible to do so, and that the question has to be answered in each case having regard to the fact involved therein. The Supreme Court held that no single test, be it control test, be it organisation or any other test has been held to be the determinative factor for determining the jural relationship of employer and employee. In para. 37 of the judgment the Supreme Court held that the control test and the organisation test are not the only factors which can be said to be decisive and that the court is required to consider several factors which could have a bearing on the result such as (a) who is appointing authority; (b) who is the pay master; (c) who can dismiss; (d) how long alternative service lasts; (e) the extent of control and supervision; (f) the nature of the job, e.g., whether it is professional or skilled work; (g) the nature of establishment; (h) the right to reject. Applying the supervisory and control test and the above tests in the present case it is to be seen whether the contracts for running the canteen entered with the contractor by the company are the sham and bogus contracts and that infact the employer and employee relationship existed between the company and the canteen workers.

24. The contracts entered into with the contractor by the company have been produced at Exb. E-29, E-69, W-37, W-38 and W-39. They are the contracts dated 1-5-83, 1-10-93, 15-3-93, 1-10-92 and 30-9-94 respectively. The union has also produced the letter dated 1-10-95 at Exb. W-41 written by the company to the contractor asking to continue the running of the canteen for a further period of 24 months from 1-10-95 to 30-9-97 under the existing terms and conditions. The terms of the contract are identical in almost all the contracts, except the Payment of service charges to the contractor which amount in some contracts varied. In the case of Artificial Limbs Manufacturing Corporation (supra) the contract between the canteen contractor and the company provided for the payment of fixed service charges to the contractor. The said fixed charges had breakups namely (a) salary and other statutory expenses and (b) for neutralising the price hike of the raw materials. The Supreme Court did not find anything wrong in fixing the fixed service charges. The Supreme Court held that it might have only ensured that the margin of profit of the contractor was reasonable and fixed on relevant considerations. In the present case also as per the contract the contractor was entitled to the payment of the fixed service charges and besides that he was entitled to a certain amount towards administrative charges. Therefore in the light of the judgment of the Supreme Court in the case of Artificial Limbs Manufacturing Corporation (supra) this was permissible and hence the payment of the said charges could not by itself lead to the conclusion that the contract entered between the company and contractor is sham and bogus. The union's witness Shri Rohidas Naik has stated in his evidence that the management of MRF and their workers have floated a society known as MRF Credit Co-op. Society and the consumer section of the said society which deals with the supply of food grains, oil and other grocery articles supplies all the required raw material to the canteen, and the bill prepared by the said society is paid by the MRF company. He has further stated that the coupons for food are given by the company to the workers and these coupons are to be presented at the counter in the canteen for booking the meals, and that the company used to make the payment to the canteen contractor based on the said coupons. The union's contention is that the employer's witness Shri Claudio Fernandes has admitted in his cross examination that the salary paid to the canteen workers and other staff members of the contractor was reimbursed by the company and that the D.A and house rent allowance also formed part of the salary and it was reimbursed. He has also admitted that the materials like cereals, wheat, rice and other non perishable items were supplied to the contractor by MRF Consumer Co-op. Society intermittently between the period 1988 to about 1994 and that the bills submitted by Co-op. Society to the contractor were being paid by the company. That he has also admitted that the manpower required for the canteen was decided by the management of the company based on the IED Study and the said decision was binding on the contractor. That he has also admitted that the cost of the meal included the cost of the wages of the canteen workers, all overheads including cost of rain coats, footwear, uniforms, towels, soaps, umbrellas. The union's witness Shri Rohidas Naik has further stated that the menu in the canteen was prepared by the company, the canteen premises belong to the company, all the furnitures, fixtures, utensils, other gadgets and equipments including freezers are supplied by the company, as also the cutlery, crockery, water and electricity was supplied freely by the company. The above facts are not denied by the company or by the contractor. Infact the supply of the above furnitures, fixtures, equipments etc., by the company is in accordance with the terms of the contracts. The contention of the union is that Mr. T. J. John the Proprietor of M/s. Icarus Foods and Farms (contractor) has also admitted in his cross examination that the company had reimbursed him towards the amount paid to the workmen towards their salary, though according to him it was for a short period and that the bill of cost submitted by him consisted of salary of the workers, gratuity, ESI contribution and other administrative cost. That he has admitted that the rate of meal mentioned in the contract includes the payment towards cost of the soaps, towels, caps, uniforms, ESI contribution of the workers, provident fund contribution of the workers, provision for gratuity, provision of salary, breakages etc., cost of food stuff and fuel. That he has admitted that from the year 1991 certain raw materials were supplied directly by MRF consumers Co-op. Society to the canteen and that the payment for the raw material was made by MRF to the said Co-op. Society, but according to him it was on his advice. That he has also admitted in his cross examination that the

menu was prepared and provided by the company. That he has admitted that quality of the material brought in the canteen was being checked by Mr. D'Souza. That he has admitted that as per clause 4 of the Agreement dated 1-5-83 Exb. E-29 the number of persons to be employed was to be decided by the company and that as per the agreements signed with the company the number of persons to be employed by him in the canteen was to be decided by the company. That he has also admitted that as per the clause in the agreements dated 15-3-93, 1-10-93, 30-9-94 the cost of the items like uniforms, footwear, towels, soaps, raincoats, umbrellas, cups, washing charges etc., supplied by the contractor to his employees was to be reimbursed by the company on production of proper bills, and that the water and electricity to the canteen was provided free of charge. That he has also admitted that the furniture and equipments including refrigerators, grinders, freezers gas stoves, cutlery, utensils, serving dishes required in the canteen were provided by the company. According to the union the above facts show that the control over the running of the canteen was with the company and as such the contracts signed between the contractor and the company are the sham and bogus contracts. I do not agree with this contention of the union.

25. It is not in dispute that the canteen is maintained by the company under Sec. 46 of the Factories Act. The said section provides that the State Government may make rules besides others, the rules providing for (a) the date on which the canteen shall be provided (b) the standards inrespect of construction, accommodation, furniture and other equipment of the canteen (c) the food stuffs to be served there in and the charges which may be made therefore (d) the constitution of the managing committee for the canteen and representation of the workers in the management of the canteen (dd) the items of expenditure in the running of the canteen which are not to be taken into account in fixing of the cost of the food stuffs and which shall be borne by the employer and (e) the delegation to the Chief Inspector, subject to such conditions as may be prescribed, of the power to make rules under clause (c). Accordingly the State of Goa under the Goa, Daman and Diu Factories Rules, 1965 has made rules under Sec. 46 of the Factories Act in respect of the canteen. Rule 96 (1) lays down that the company shall provide in or near the factory an adequate canteen according to the standards prescribed in the rules. Thus as per the said rule the canteen is to be provided within the factory premises or nearby to the factory. In the present case the company provided canteen within the factory premises which is in accordance with the provisions of the above rule. Rule 98 deals with equipments. It lays down that sufficient utensils, crockery, cutlery, furniture and other equipment necessary for the running of the canteen are to be provided and maintained and also that suitable clean clothes for the employees serving the canteen are also to be provided and maintained. Sub. Clause (2) of the said rule provides that suitable facilities including an adequate supply of hot water are to be provided for the cleaning of utensils and equipment. Rule 99(2) lays down that food, drink, and other items served in the canteen shall be sold on a non-profit basis and the prices charged shall be subject to the approval of the canteen Managing Committee. Rule 99(3) lays down that in computing the prices of the foodstuff the following items of expenditure shall not be taken into consideration but shall be borne by the company namely (a) the rent for the land and building; (b) depreciation and maintenance charges of the building and equipment provided for the canteen; (c) the cost of the purchase, repairs and replacement of equipment including furniture, crockery, cutlery and utensils; (d) the water charges and expenses for providing lighting and ventilation; (e) the interest on the amount spent on the provision and maintenance of the building, furniture and equipment provided for the canteen; (f) the cost of the fuel required for cooking or heating food stuffs or water and (g) the wages of the employees serving in the canteen and the cost of the uniform, if any provided to them. Rule 101 lays down that a managing committee shall be constituted which shall be consulted from time to time as to the quality and quantity of food stuffs to be served in the canteen, the arrangement of the menus; the time of serving meals in the canteen; the time of serving meals in the canteen and any other matter pertaining to the canteen as may be directed by the committee.

26. As regards the contention of the union that it has been proved from the contracts entered between the company and the contractor and the evidence which has been discussed above that the furniture, fixtures, gadgets, equipments described above and the utensils and crockery were supplied by the company to the contractor, and the menu was prepared by the company as also the rate of the goods was fixed by the company which show that the control over the running of the canteen was with the company and therefore the contracts are sham and bogus, in my view the said contention of the union does not stand in view of the judgment of the Supreme Court in Artificial Limb Manufacturing Corp. (supra). In this case the Supreme Court held that the agreement must be construed in the background of the rules framed by the Government under Sec. 46(2) of the Factories Act, 1948. The Supreme Court held that under Sec.46 (2) the Government is empowered to lay down inter alia "the standard in respect of construction, accommodation, furniture and other equipment of the canteen and the food stuffs to be served therein and the charges which may be made therefore." The Supreme Court held that merely because there is compliance with the rules by the respondent company (assuming that the rules applied) by providing the equipment and for the rate at which the food stuffs should be sold at the canteen by the contractor would not necessarily mean that the employer was running the canteen through the agency of the contractor and that there must be something more. In the present case also the state Government has made the rules under Sec. 46(2) of the Factories Act. The said rules have been

enumerated by me hereinabove. Therefore, providing of the furnitures, fixtures, equipments, gadgets, utensils, crockery; and the preparation of the menu and the rate of the food stuff was in compliance with rules framed by the State Government namely the rule 98, 99(3) and 101 and therefore it cannot be said that because of the above the control of running of the canteen was with the company and therefore the contracts are sham and bogus. Similarly merely because the company was reimbursing the contractor the cost of the items like uniforms, soaps, washing charges, water and electricity charges, fuel etc., or that the company's person was checking the quality of the material brought in the canteen, it cannot be said that the company had the control over the running of the canteen and that infact the contracts are sham and bogus, because as per the rule 98 and 99(3) of the Rules framed by the State Government it is the responsibility of the employer to provide for suitable and clean clothes, to the employees working in the canteen and bear the cost of the same and also bear the cost of the fuel required for cooking, water charges and providing lighting and ventilation as also the employer has to provide for adequate supply of hot water. Therefore the company was acting in compliance with the above rules. The other contentions which have been raised by the union are that it has come in evidence documentary as well as oral that the company was reimbursing the contractor towards the wages paid to the canteen workers and other staff members of the contractor, bills of the MRF Consumer Co-op. Society towards the supply of the materials to the contractor were paid by the company, ESI contribution, Provident contribution of the canteen workers, provision for gratuity, breakages, cost of food stuff, fuel, cost of the materials like uniform, footwear, towels, soaps, rain coats, umbrellas, caps, etc., and also that the manpower required for the canteen was decided by the management of the company based on the IED study and the said decision was binding on the contractor which shows that the control over the running of the canteen was with the company and therefore the contracts are nothing but sham and bogus. Similar issues had arisen in an unreported judgment of the Bombay High Court at Goa in Writ Petition No.182 of 2004 in the matter between M/s. Sesa Goa Limited v/s Mormagao Waterfront workers union and others. In this case under the contract order signed between Sesa Goa Ltd., and M/s. Agencia Ultramarine Private Ltd., the contract was for providing necessary manpower for carrying out the transhipping activities, including the management of transhipper equipments like cranes, conveyors, loaders, and other allied machineries. In the said contract the number of the manpower to be employed by the contractor M/s. Agencia Ultramarine in various categories was mentioned; the contractor was liable to make payments to the said persons employed; the cost of the boiler suits, hand gloves, a pair of safety shoes, safety helmet provided by the contractor, was to be reimbursed by the company; the actual amount paid by the contractor towards the insurance of the employees excluding clerks not exceedings Rs. 1000/- per annum per employee was to be reimbursed by the company; for managing the activities the contractor was to be paid fee of Rs. 15000/- per month from June to September and Rs. 25,000/- per month from October to May and lastly the company was to make 100% payment every month for the expenses incurred by the contractor for the previous month within 10 days of submitting the bill. The above terms of the contract show that for executing the contract what the contractor was entitled to was only the fixed amount liable to be paid to him towards his fees and he was liable to be reimbursed fully every month towards the expenses incurred by him including the wages of the employees. The Industrial Tribunal after assessing the documentary as well as oral evidence led by the parties came to the conclusion that the workers under the reference were in reality the workers of the company M/s. Sesa Goa and that M/s. Agencia Ultramarine was an agent, a mere ploy and a name lender and the contracts were sham and bogus. The Tribunal also came to the conclusion that since the Director of M/s. Agencia Ultramarine was paid by M/s. Sesa Goa Rs. 15000/- p.m., from June to September and Rs. 25,000/- from October to May it indicated that in reality he was the employee of M/s. Sesa Goa and the workers engaged by him were the workers of M/s. Sesa Goa. In this case though the dispute was referred regarding the legality of the retrenchment of the workmen by the contractor M/s. Agencia Ultramarine Pvt. Ltd., who were working in transhipper M. V .Orissa of M/s. Sesa Goa Ltd., on the basis of the pleadings made by the parties the Industrial Tribunal had framed issues and one of the issues was whether the relation of employer and employee exists between the company and the workmen of the contractor who were retrenched. The objection raised by the company and the contractor regarding the framing of the above issue was rejected by the Tribunal. Therefore the issues of relationship of employer and employee between the company and the workmen of the contractor who were retrenched and the sham and bogus contract were before the Hon'ble Bombay High Court. The Bombay High Court after considering the various judgments of the Supreme Court including the judgment in the case of Steel Authority of India (supra) and Artificial Limb Corporation (supra) held that the findings recorded by the Tribunal were wholly untenable and they were against the settled position of law. The High Court did not hold that the contracts signed between M/s. Sesa Goa and M/s. Agencia Ultramarine were sham and bogus because of the fact that in terms of the said contracts the contractor M/s. Agencia Ultramarine was fully reimbursed by the company M/s. Sesa Goa towards the expenses incurred by them including the payment of the wages of the employees, ESI contribution, Provident Fund contributions and other expenses mentioned hereinabove or that the number of persons to be employed by the contractor in the categories was determined by M/s. Sesa Goa. Therefore there is no substance in the contention of the union that because admittedly the company was reimbursing the contractor every month in respect of the matters

mentioned hereinabove which included wages of the canteen workers, their ESI and Provident Fund contribution and the company was deciding the employment of the man power of the canteen, the company was controlling the running of the canteen and that infact the canteen workers were the employees of the company and the contracts as such were sham and bogus.

27. Various judgments of the Supreme Court and other courts on the issue have been discussed by me earlier. The gist of the said decisions is that to determine whether the canteen workers in fact were the employees of the principal employer, that is the company and the contracts were sham and bogus, it is necessary to find out who was exercising the supervision and control over the running of the canteen. As per the judgment of the supreme court in the case of Artificial Limb Corporation case (supra) the exercise of supervision and control should be over the employees of the contractor, that is the workers working in the canteen. In the case of CESC Limited V/s Subhash Chandra Bose and others reported in 1992 LLR 81 the question involved was the interpretation of the word "supervision" as under the ESI Act no definition of the same was given. The Supreme Court in para 14 of the Judgment held as follows;

> "In the ordinary dictional sense 'to supervise' means to direct or oversee the performance or operation of an activity and to oversee it, watch over and direct. It is the work under eye and gaze of some one who can immediately direct a corrective and tender advice. In the textual sense 'supervision' of the principal employer or his agent is on 'work' at the places envisaged and the word 'work' can neither be construed so broadly to be the final act of acceptance or rejection of work, nor so narrowly so as to be supervision at all times and at each and every step of the work. A harmonious construction alone would help carryout the purpose of the act, which would mean moderating the two extremes. When the employee is put to work under the eye and gaze of the principal employer or his agent where he can be watched secretly, accidentally or occasionally while, the work is in progress, so as to scrutinize the quality thereof and to detect faults there in, as also put to timely remedial measures by directions given, finally leading to the satisfactory completion and acceptance of the work, that would in our view be supervision for the purposes of Sec. 2(9) of the Act".

It is therefore to be seen whether in the present case the company was exercising the nature of the Supervision laid down by the Supreme Court in the above case of CESC Limited (Supra).

28. In the case of Artificial Limb Corporation the Supreme Court has held that the control and supervision should be over the employees of the contractor. In that case the Supreme Court found that company had no say as to who should be employed by the contractor nor the method of recruitment to be followed by the contractor, there was no obligation on the contractor to employ the persons who had served under earlier contractors and even if it was so it would not necessarily mean that those employees were the employees of the establishment; the contractor in his cross examination had stated that he used to supervise and control his employees and pay their salaries and the workmen had also stated that their salaries were paid by the contractor, the raw materials were brought by the contractor; the company had no hand in selection of the employees of the canteen; the prescribed procedure for appointing the employees of the company did not apply to them nor the company recorded their attendance. Considering the above factors the Supreme Court held that the company did not exercise any control or supervision over the employees of the contractor. In the case of workmen of Nilgiri Co-operative Marketing Society Ltd., (Supra) the Supreme Court has held that for determining the Jural relationship of employer and employee between the principal employer and the employees of the contractor, the control test and the organization test are not the only factors which can be said to be decisive and that the court is required to consider several factors which could have a bearing on the result such as (a) who is the appointing authority; (b) who is the pay master; (c) who can dismiss; (d) how long alternative service lasts; (e) the extent of control and supervision; (f) the nature of the job; e.g. whether it is professional or skilled work; (g) the nature of the establishment; (h) the right to reject. Therefore applying the above tests laid down by the Supreme Court in the case of CESC Ltd., (Supra), Artificial Limb Manufacturing Corporation (Supra) and workmen of Nilgiri Co-operative Marketing Society Ltd., (Supra) it is to be seen whether the company had the control and supervision over the canteen workers and there existed employer employee relationship between the company and the canteen workers so as to hold that the contracts entered between the company and the contractor were sham and bogus contracts.

29. The Union's witness Shri Rohidas Naik has stated that the workmen in the present reference namely Santosh Sangodkar, Ragoba Falari, and Subhash Naik were working in the canteen continuously from the date of their initial employment. He has stated that Ragoba Falari started working in the canteen from the year 1975, Shri Santosh Sangodkar started working from the year 1989 and Shri Subhash Naik started working from the year 1990, and that they were not transferred in any other canteen or any other factory nor they were given break in service. He has stated that when he joined the services in 1975 about 25 workers were working in the canteen and they worked continuously though the canteen contractors changed. In the contracts executed between the company and the contractor it was never a term that the contractor should

employ the workers of the earlier contractor nor it is the case of the union that he was bound to employ the workers of the earlier contractor. Even then the Supreme Court in the case of Artificial Limb case has held that even if it was so, it would not mean that they were the workers of the establishment. In the case of workmen of Nilgiri Co-operative Marketing Society (Supra) the Supreme Court at para 35 has held that it is not possible to infer that a relationship of employer and employee has come into being only because some persons had been more or less continuously working in a particular premises in as mush as even in relation there to the actual nature of work done by them coupled with other circumstances would have a role to play. Same principles are laid down by the Supreme Court in the case of R. K. Panda V/s Steel Authority of India Ltd. reported in 1994 II CLR 402. In this case the Supreme Court has held that a clause in the contract containing a condition that the contractor must retain the old employees, which is benevolently inserted to protect the continuance of the source of livelihood of the contract labour cannot by itself give rise to a right to regularization in the employment of the principal employer. Therefore in the present case even if it is assumed that the workers in the canteen continued to work there continuously even though the contractors changed, that by itself would not entitled the workers to be deemed to be the employees of the company. The union's witness Shri Rohidas Naik has stated that the MRF Co-operative Credit Society floated by the management of MRF and its workers had a consumer section which supplied food grains, oil and other grocery articles to the employees of the company, used to supply all the required raw material to the canteen. Thus, admittedly the company had no concern in the supply of raw material to the canteen. The said witness has stated that one Mr. Rajmohan was the Manager of the contractor who was sanctioning the leave of the canteen workers. He has stated that the contractor had issued charge sheets to some canteen workers, which shows that the disciplinary powers were with the contractor. He had admitted that the contractor had employed supervisions and Mr. Rajmohan was working above the supervisors. He has stated that the supervisors were working in shifts and they were supervising over the work of the canteen workers. He has stated that his union had signed settlements with contractor Mr. T. J. John. The said settlements have been produced at Exb. E-8, E-10 and E-11. He has admitted that to the said settlements the company is not a party. The said settlements were signed for giving better conditions of service to the canteen workers. He has admitted that the canteen workers had formed a union of their own known as Icarus Foods and Farm Workers Union. He has admitted that as per the settlement dated 2-5-1984 Exb. E-13 signed between his union and the company the thrift scheme was made applicable to all the confirmed workers of the company as on 1-4-1984 and that the thrift scheme was introduced for the first time in the settlement dated Exb. E-10 signed between the union and the contractor. He has admitted that the thrift scheme was provided separately by the company to its permanent workers and by the contractor to the canteen workers. He has admitted that by settlement dated 20-11-1991 Exb. W-13 canteen subsidy was provided by the company to its workers whereas by settlement dated 28th January, 1988 Exb. E-14 canteen subsidy was provided to the canteen workers by the contractor. Both the above settlements are signed by the union, that is, Goa MRF Union. The Union's witness Shri Santosh Sangodkar has admitted in his cross--examination that he had obtained loan of Rs. 5000/- in November, 1994 from the thrift fund created by the contractor. The above facts show that the canteen workers were never treated or considered as the employees of the company. He has admitted that the wage slips Exb. W -12 colly were issued by the contractor Icarus Foods. One wage slip is pertaining to the workman Shri Santosh Sangodkar for the month of January, 1997 and the other one is pertaining to the workman Shri Ragoba Falari for the month of October, 1996. Shri Santosh Sangodkar and Shri Ragoba Falari are the parties in the present reference. Besides, the union has examined the workman Shri Santosh Sangodkar. He has admitted in his cross-examination that his salary was being paid by the contractor M/s. Icarus Foods. He has also stated in his cross that a wage register was being maintained in the canteen. He has identified his signature on the wage register for the month of June, 1996 Exb. E-27. The said wage register shows that it was maintained by the contractor M/s. Icarus Food and Farms. He has admitted that the salary certificate Exb. E-26 was issued to him by the contractor. The above evidence therefore proves that the wages of the canteen workers were being paid by the contractor. He has stated in his cross that Mr. Prabhu was the canteen supervisor of the contractor. He has admitted the receipt of the warning letter dated 10-10-1992 Ecb. E-21 and charge sheet dated 22-10-1992 Ecb. E-20. The warning letter as well as the charge sheet are issued to him by the contractor. The warning letter was issued to him for his unauthorized absence for 3 days and the charge sheet was issued for refusing to carry out the instructions of the supervisor. He has also admitted the leave application dated 16-6-1995 Exb. E-23 made by him to the manager of the contractor requesting for 5 days privilege leave on account of his marriage. He has admitted the letter dated 7-7-1995 Exb. E-24 addressed by him to the manager of the contractor requesting for 2 days privilege leave. He has identified the signature of Mr. T. J. John, the contractor on the leave application dated 16-6-1995 Exb. E-23. As per the remark made by Mr. T. J. John, he had granted leave to Mr. Sangodkar. He has admitted the complaint dated 3-4-1996 Exb. E-25 made by him to the manager of the contractor against Mr. Jose Rodrigues, who was working in the canteen. The said complaint is regarding the mis-behaviour of Mr. Jose Rodrigues towards him while performing his duty. Though in the deposition Shri Sangodkar stated that Mr. Anthony D'Souza working as manager in the company used to supervise over the canteen, he admitted in his cross that Mr. Prabhu was the canteen supervisor of the contractor. No evidence

whatsoever has been produced by the union to prove that Mr. Anthony D'Souza was supervising over the canteen. Merely because in the bills submitted by the contractor to the company, the word supervisor Mr. Anthony D'Souza has signed, it does not mean that infact he was supervising over the canteen. Mr. T. J. John has denied that Mr. Anthony D'Souza was supervising over the canteen. On the contrary the union's witness has stated that the contractor had employed supervisors and the Manager Mr. Rajmohan appointed by the contractor was working over them. The workman has admitted in his cross that Mr. Prabhu was working as the canteen supervisor. On behalf of the contractor, Mr. T. J. John, the proprietor, has examined himself. He has produced the settlement dated 20-11-1991 Exb. E-34 signed between him and MRF Employees Union and the muster roll for the month of June 1996 Exb. E-35 maintained by him. He has produced the statement Exb. E-36 issued by the LIC for the month of January, 1997 in respect of the premium paid by him in respect of the canteen workmen. He has produced the leave cards of the workmen, Chaitan Kadam Exb. E-37; that of Santosh Sangodkar Exb. E-38 and that of Subhash Naik Exb. E-39. He has identified the signature of the Manager Mr. Rajmohan and that of the Administration Supervisor, Mr. N. G. Prabhu on the said leave cards. These leave cards are not disputed by the union. He has produced the settlement Exb. E-40 signed by the workman Mr. Chaitan Kadam with the contractor and the letter dated 15-?-1997 Exb. E-42 given by the workman Karupa Swamy stating that he is resigning from services as well as the receipt Exb. E-44 issued by him to the contractor acknowledging the receipt of the amount in full and final settlement of his dues. He has produced the charter of demands Exb. E-47 submitted by the canteen workmen and the letter dated 20-5-1995 Exb. E-48 sent to the Labour Commissioner, Panaji, signed by the representatives of the canteen workmen and the contractor requesting for registration of the settlement. He has produced the settlement dated 14-2-1997 Exb. E-49 signed between the contractor and Icarus Foods and Farms Workers Union. He has also produced the retrenchment notices dated 17-2-1997 sent by the contractor to the workmen, Shri Subhash Naik, Santosh Sangodkar and Ragoba Fallari by registered post along with the cheques. The said notices are produced at Exb. E-50 colly, E-51 colly and E-52 colly. The union has not disputed that the services of the above workmen were terminated by the contractor. In his cross--examination suggestions were put to the effect that he was not signing the cheques issued to the workmen towards loan for the thrift fund; that manager was not issuing salary certificate on the letter head of M/s. Icarus Foods and Farms, nor he was signing the same nor he was authorized to do so; that neither he nor the manager Mr. Rajmohan were signing the charge sheet; that the canteen workers are the workers of the company; that the contractor did not have a separate P. F. Scheme sub-code No. MH/1013-A for its employees; that the workmen of the contractor did not organize themselves into an union with registration No. 350 or that he did not recognize the said union and did not negotiate with it; that he did not negotiate the settlements dated 22-3-1995 signed between him and Goa MRF Employees Union and that it was negotiated by the company. The above suggestions were denied by Mr. T. J. John. The suggestions put by the union are negatived by the documents produced by the contractor. It is well settled that mere suggestions do not prove anything. It is not the case of the union that the workers in the canteen were appointed by the company. Nor any evidence has been brought on record to show that appointment of the workers in the canteen was done by the company and not by the contractor. On the contrary, clause 4 of the contract dated 15th March, 1993 Exb. W-37 shows that the workers in the canteen were to be appointed by the contractor and the contractor had to initiate disciplinary action against the workers as and when required. Similar clause is provided in all the contracts. Therefore the appointing authority of the canteen workers was the contractor. Even if it is assumed that the workers employed by the earlier contractor continued to work with the contractor M/s. Icarus Foods and Farms, it does not mean that the said workers were appointed or employed by the company. Clause 29 of the contract dated 15th March, 1993 Exb. W-37 empowered the company to cancel the contract at any time in case the contractor failed to abide by any of the terms and conditions of the agreement or if the canteen was not seen to run satisfactorily. Similar clause is there in all the other contracts. Therefore the right to reject the contract was with the company. There is evidence that the number of persons to be employed by the contractor was to be decided by the company. But there is no evidence to show that the company used to decide as to who should be employed nor there is any evidence to show that the company had any say or hand in selecting the employees for working in the canteen. Infact it is not the case of the union that the company was deciding as to which person should be employed by him or that the company was involved in the process of selection of the employees to be employed by him. Considering all the above evidence documentary as well as oral evidence discussed by me, I hold that the company had no control and supervision over the canteen workers and there did not exist employer--employee relationship between the company and the canteen workers. In the circumstances, I hold that the union has failed to prove that the contract executed between MRF company and the contractor M/s. Icarus Foods and Farm is sham and bogus. I therefore answer the issue No. 1 in the negative.

30. *Issue Nos. 2 and 5:* The workmen Shri Ragoba Fallari, Shri Santosh Sangodkar and Shri Subhash Naik would have been entitled for absorbtion in service by the MRF company with appropriate fitment in the pay scales if it was held that the contract executed between the company and the contractor was sham and bogus.

While deciding the issue No. 1 it has been held by me that the contract executed between MRF company and the contractor M/s. Icarus Foods and is not sham and bogus and that the employer-employee relationship did not exist between the MRF company Farm and the canteen workers. This being the case I hold that the workmen Shri Ragoba Falari, Shri Santosh Sangodkar and Shri Subhash Naik are not entitled for absorption by MRF Company with appropriate fitment in the pay scales. I, further hold that in the facts and circumstances of the case the above workmen are not entitled to any relief. I, therefore answer the issue Nos. 2 and 5 in the negative.

In the circumstances, I pass the following order.

ORDER

It is hereby held that the demand of Goa MRF Employees Union on the ground that the contract between M/s. Madras Rubber Factory Ltd., and M/s. Icarus Foods and Farm is sham and bogus, for absorption of the three canteen workers namely Shri Ragoba Fallari, Shri Santosh Sangodkar and Shri Subhash Naik, by the management of M/s. Madras Rubber Factory Ltd., with effect from 1-10-1996 with appropriate fitment in the pay scales is not legal and justified. It is hereby further held that the said three workmen are not entitled to any relief.

No order as to cost. Inform the Government accordingly.

Sd/-
(Ajit J. Agni),
Presiding Officer,
Industrial Tribunal.

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